82-1120

No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

MARY LOU TORAASON,

Petitioner,

VS.

LAURA L. BURKART,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE APPELLATE COURT OF ILLINOIS, THIRD JUDICIAL DISTRICT

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QUESTION PRESENTED FOR REVIEW

Whether the judgment of the Illinois Appellate Court, Third District, affirming a $350,000 judgment on the verdict below constitutes a denial of due process of law and equal protection of the law under the Fourteenth Amendment to the United States Constitution when the Illinois Supreme Court, subsequent to its denial of a petition for leave to appeal from such opinion of the Illinois Appellate Court, Third District, refused to even file petitioner's petition for rehearing of the denial of the petition for leave to appeal in which consideration of the effect of an intervening decision of the Illinois Supreme Court of apparent controlling effect decided subsequent to the filing of the petition for leave to appeal was first able to be presented for consideration on review.

TABLE OF CONTENTS

APPENDIX

TABLE OF AUTHORITIES

Cases

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OPINIONS BELOW

The opinion of the Illinois Appellate Court, Third District, (under Docket No. 81-600) is reported at 107 Ill. App. 3d 92, 62 Ill. Dec. 861, 437 N.E.2d 388 (Decided 9/17/82). That opinion is attached hereto as Appendix A.

JURISDICTION

Date Of Entry Of Judgment

Subsequent to this opinion, petitioner herein filed a timely petition for leave to appeal in the Illinois Supreme Court. On October 5, 1982, the Illinois Supreme Court denied said petition for leave to appeal. (See Appendix B). Whereupon your petitioner herein filed a petition for rehearing of the denial of its petition for leave to appeal, citing the effect of an intervening Illinois Supreme Court decision of apparently controlling effect on Statute of Limitations question involved in this case.

On October 25, 1982, by letter from the Clerk of the Illinois Supreme Court, with reference to Docket No. 56945, the docket number under which this matter was considered in the Illinois Supreme Court, the attorney for petitioner herein was advised that the petition for rehearing was returned under separate cover on the ground that there was no provision under their rules for filing a petition for rehearing upon the denial of a petition for leave to appeal. The text of said letter is attached hereto as Appendix C.

Statutory Basis Of Jurisdiction Of This Court

This Court's jurisdiction is invoked under U.S.C. 1257(3).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Fourteenth Amendment, United States Constitution, Sec. 1

All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property without due process of law; *nor deny to any person the equal protection of the laws.*

Illinois Revised Statutes, Ch. 83, §22.1

No action for damages for injury or death against any physician or hospital duly licensed under the laws of this state, whether based on tort, or breach of contract shall be brought more than 2 years after the date on which the claimant knew or should have known, or received notice in writing of the existence of the injury or death from which damages are sought in the action, whichever of such dates occurs first, but in no event shall such action be brought more than four years after the date on which occurred the act or omission or occurrence alleged in such action to have been the cause of such injury or death.

STATEMENT OF THE CASE

Plaintiff sued petitioner, Dr. Mary Lou Toraason, for alleged malpractice in post-natal care which she alleged resulted in an anal-vaginal fistula. A verdict of $350,000 was entered at trial.

On appeal to the Illinois Appellate Court, Third District, petitioner claimed, in part, that since plaintiff was shown to have known of her injury more than two years prior to filing suit, the trial Court should have barred her suit under the applicable Illinois Statute of Limitations, being Ill. Rev. Stat. Ch. 83, §22.1, set forth in full above, which barred medical malpractice cases brought more than two years after the date on which a claimant knew or should have known of the existence of the injury.

The evidence in our case showed without contradiction that on her first day home after the birth of her second child and after several days with no bowel movement and with pain and pressure from episiotomy stitches, plaintiff's incision burst open after taking a laxative. She knew this from the first and knew of the common opening which resulted. No suit was filed until more than two years later.

The Illinois Appellate Court, Third District, affirmed the verdict and judgment and Dr. Mary Lou Toraason timely filed a petition for leave to appeal to the Illinois Supreme Court.

On October 5, 1982, the petition for leave to appeal was denied by the Illinois Supreme Court. Within twenty-one days thereafter Dr. Mary Lou Toraason mailed to the Illinois Supreme Court a petition for rehearing of the denial

of her petition for leave to appeal, citing the apparent controlling effect of an Illinois Supreme Court case decided after the petition for leave to appeal had been filed; to wit: *Sharpe v. Jackson Park Hospital, et al.*, 92 Ill. 2d 232, 441 N.E.2d 645, Docket No. 55691, opinion filed September 17, 1982. The *Sharpe* opinion expressly held that knowledge of the existence of a physical injury more than two years before filing suit bars the suit under Ill. Rev. Stat. Ch. 83, §22.1. Dr. Mary Lou Toraason expressly argued therein that failure to consider the effect of the recent *Sharpe* case (not merely given prospective effect only) would be to deprive her of federal due process and equal protection of the laws under Section I of the Fourteenth Amendment to the United States Constitution.

On October 25, 1982, the Illinois Supreme Court Clerk, by letter (see appendix), returned the petition for rehearing unfiled citing an absence of an express provision under Illinois Supreme Court rules for filing a petition for rehearing from the denial of a petition for leave to appeal.

REASONS FOR GRANTING THE WRIT

THE OPINION OF THE ILLINOIS APPELLATE COURT CONSTITUTES A DENIAL OF DUE PROCESS AND EQUAL PROTECTION UNDER THE FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION SINCE THE ILLINOIS SUPREME COURT ON PETITION FOR REHEARING OF ITS DENIAL OF PETITION FOR LEAVE TO APPEAL DENIED PETITIONER THE BENEFIT OF A CONTROLLING DECISION DECIDED AFTER THE PETITION FOR LEAVE TO APPEAL WAS DECIDED.

The following general principles as to requirements of federal due process apply.

This Court has held that the application of rules in relation to whether or not a decision of an appellate court will be applied retroactively must be considered in light of the totality of the circumstances as to the effect on other constitutional rights, including the right to due process. *Brinkerhoff v. Faris Trust & Sav. Co.*, 281 U.S. 673, 74 L.Ed. 1107, 50 S.Ct. 451.

State decisions as to due process of law must be controlled by decisions of the federal courts, *Pembleton v. Illinois Commercial Men's Assoc.*, 289 Ill. 99, 124 N.E. 355. A fair trial is a basic requirement of due process. *Nebraska Press Assoc. v. Stuart*, 427 U.S. 539, 49 L.Ed.2d 683, 96 S.Ct. 2791.

This Court has held that due process is not confined within a permanent definition of what may at a given time be deemed the essential limits of fundamental rights. *Frank v. Maryland*, 359 U.S. 360, 3 L.Ed.2d 877, 79 S.Ct. 804, reh. den. 360 U.S. 914, 3 L.Ed.2d 1263, 79 S.Ct. 1292. Its exact boundaries are indefinable and its content varies according to specific facts. *Hannah v.*

Larche, 363 U.S. 420, 4 L.Ed.2d 1307, 80 S.Ct. 1502, reh. den. 364 U.S. 855, 5 L.Ed.2d 79, 815 S.Ct. 33.

Due process has to do with the denial of fundamental fairness. *Kinsella v. United States*, 361 U.S. 234, 4 L.Ed. 2d 268, 80 S.Ct. 297. (Emphasis ours) Procedural due process has never been of fixed and invariable content. *Federal Communications Com. v. W.J.R. Goodwill Station, Inc.*, 337 U.S. 265, 93 L.Ed. 1353, 99 S.Ct. 1097. Again, the propriety of the deprivation of property must be resolved in a manner consistent with *fundamental fairness. Hannah v. Larche*, 363 U.S. 420, 4 L.Ed.2d 1307, 80 S.Ct. 1502, reh. den. 364 U.S. 855, 5 L.Ed.2d 78, 81 S.Ct. 33. Whether the trial is in Federal or State courts, the concern of due process is with the fair administration of justice. *Mayberry v. Pennsylvania*, 400 U.S. 455, 27 L.Ed.2d 532, 91 S.Ct. 499.

Although a state is not required to provide a system of appeal, once an appeal is afforded, it cannot be discriminatorily administered without violating equal protection requirements. *Lindsey v. Normet*, 405 U.S. 56, 31 L.Ed. 2d 36, 92 S.Ct. 862.

A discriminatory denial of a right of appeal is a violation of the right to equal protection of the law. *Mayer v. City of Chicago*, 400 U.S. 189, 30 L.Ed.2d 372, 92 S.Ct. 410.

An actual discrimination arising from the method of administering a law is as potent in creating a denial of equality of rights as a discrimination made by law. *Rogers v. Alabama*, 192 U.S. 226, 48 L.Ed. 417, 24 S.Ct. 257.

The United States Constitution requires that, when provided, appeals must comport with principles of due process and equal protection. *Dorrough v. Estelle*, C.A.

Tex. 1974, 497 F.2d 1007, rev. on other grounds, 95 S.Ct. 1173, 420 U.S. 534, 43 L.Ed. 377, rehearing denied, 95 S.Ct. 1589, 421 U.S. 921, 43 L.Ed. 790.

In the case of *Sharpe v. Jackson Park Hospital, et al.*, 92 Ill. 2d 232, 441 N.E.2d 645 (September 17, 1982), Docket No. 55691, a case decided after our petition for leave to appeal to the Supreme Court of Illinois was filed but before the order denying leave to appeal, the Illinois Supreme Court held that the language of Ill. Rev. Stat., Ch. 83, par. 22.1 unequivocally provides for a period of limitations within which a suit must be filed within 2 years "after the date on which the claimant knew . . . of the existence of the injury . . .". This opinion would appear to be clearly controlling under the facts of our case and should require a reversal of the opinion of the Illinois Appellate Court, Third District, in this case.

In our case a rule of law which apparently totally contradicts the opinion herein by the Illinois Appellate Court was published shortly before the denial of our petition for leave to appeal and thus was not cited in the petition. Future litigants will routinely be able to have such decision control of their cases at trial or on appeal.

Dr. Mary Lou Toraason sought the same right by petition for rehearing, asking that the rule of that case be applied to her. She was denied that consideration by the Illinois Supreme Court on October 25, 1982, and the opinion of the Illinois Appellate Court should, therefore, be reversed.

Under the authorities cited, petitioner herein was clearly denied both fundamental due process of law and the equal protection of the law by such arbitrary action and will unjustly suffer thereby to the loss of $350,000 plus costs and interest should proper review be denied her.

CONCLUSION

For the reasons given above, petitioner, Mary Lou Toraason, respectfully asks this Court to grant its petition for certiorari to the Illinois Appellate Court, Third District, and to review the action of that Court herein and the action of the Illinois Supreme Court in denying leave to appeal and petition for rehearing of that denial of leave to appeal, and reverse the opinion herein of the Illinois Appellate Court, Third District, under prevailing Illinois law.

Respectfully submitted,

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